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No. 98-404

In The

Supreme Court of the United States

October Term, 1998

UNITED STATES DEPARTMENT OF COMMERCE, et al.,

Appellants,

v.

UNITED STATES HOUSE OF REPRESENTATIVES, et al.,

Appellees.

On Direct Appeal from the United States
District Court for the District of Columbia

BRIEF OF THE STATE OF WISCONSIN AND THE COMMONWEALTH OF PENNSYLVANIA IN SUPPORT OF APPELLEE UNITED STATES HOUSE OF REPRESENTATIVES

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13 pp

TABLE OF CONTENTS

CASES CITED

CONSTITUTIONAL PROVISIONS

STATUTES

OTHER AUTHORITIES

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INTEREST OF THE AMICI CURIAE

The Census Clause of the United States Constitution (art. I, § 2, cl. 3) commits to Congress the determination of the manner of taking the decennial census of the states' populations. The sole textual purpose of the census is the apportionment of seats in the United States House of Representatives among the states.

Amici are states whose representation in the national Congress is based on their own and the other states' population totals. The Executive Branch seeks to employ statistical sampling of an unprecedented nature and scale in deriving the year 2000 apportionment census. Wisconsin and Pennsylvania would have lost seats in Congress had a statistical adjustment

of the 1990 census been ordered. The States of Wisconsin and Pennsylvania believe that at a minimum the use of a statistically estimated census to apportion Representatives among the states requires congressional consideration and authorization. Because such consideration and approval have not been given, and because Congress has instead prohibited the use of sampling for the apportionment census, *amici* file this brief in support of plaintiff-appellee, the United States House of Representatives, and in support of affirmance of the district court's judgment.

SUMMARY OF ARGUMENT

The Constitution commits to Congress the determination of the manner of taking the decennial census. The census has only one textual and one principal constitutional purpose–that of determining the states' populations for purposes of apportioning Representatives in the House of Representatives.

Terms such as "sampling" or "statistical estimation" can be misleading in suggesting a single procedural alternative to the traditional enumeration census. The reality is that questions of whether and how to conduct such a census present complex issues of policy and methodology. For the 2000 census, the Executive Branch chose not to ask Congress to resolve those issues or to authorize an estimated census. Instead, it claims the authority to employ sampling to determine the states' apportionment totals based on a strained, and ultimately implausible interpretation of the Census Act.

The district court's decision and the House of Representatives' brief address the Executive Branch's claims of statutory authorization. *Amici* believe that it is useful to recall some of the policy, methodological and constitutional issues which Congress needs to resolve before the first-ever estimated apportionment census is conducted. The mere fact that differential census coverage rates exist, as they have existed since the 1790 census, does not, of itself, mean that statistical estimation is the solution, or that any particular bundle of

estimation procedures should be adopted. The impact of census coverage differentials upon the states' population totals, and still more so upon the congressional apportionment, is complex and indirect. Notwithstanding the Census Bureau's claims that its estimation procedures are immune from political or other manipulation, the results of statistical estimation are highly sensitive to underlying modeling assumptions and methodological decisions. The interaction between this methodological sensitivity and the apportionment function means that statistical estimation has every potential to produce a malapportionment of Congress, as would have almost certainly occurred had the 1990 census estimates been adopted.

If the apportionment census is to be estimated, it must be at the direction of Congress after plenary review and debate and after sufficient safeguards have been established to ensure the impartiality, accuracy and usability of its results. What is not a constitutionally permissible course is for the Executive Branch to abrogate Congress's textual powers, claiming a wholly unrestricted authority to employ any type of sampling or survey in deriving the population totals used to apportion the House of Representatives.

ARGUMENT

THE EXISTENCE OF DIFFERENTIAL CENSUS COVERAGE RATES DOES NOT JUSTIFY THE EXECUTIVE BRANCH'S PLANS TO ESTIMATE THE APPORTIONMENT CENSUS ABSENT CONGRESSIONAL AUTHORIZATION.

Both the Government and the defendants-appellees rely on a reading of the Census Act as authorizing the unrestrained use of sampling in the taking of the apportionment census. As we understand the statutory interpretation being offered, Congress is claimed to have granted the Secretary of Commerce discretion to use "sampling procedures and special surveys," 13 U.S.C. § 141(a), in conducting the apportionment census, without placing a single limit, other than the census date, on

the exercise of that discretion. The statutory authorization of sampling as part of the decennial census is identical to the authority granted for the mid-decade census. *Cf.* 13 U.S.C. § 141(a) and (d). Accordingly, under this view, Congress has not merely granted the Secretary of Commerce the authority to carry out the Census Bureau's current plans to estimate the year 2000 census, but has authorized the apportionment census to be taken through a sample of one in every six households or less.[1]

The arguments for this authority to use sampling are not so much that it was granted by design, but as an artifact of the Act's amendments between 1957 and 1976. Nevertheless, both the Government and the defendants-appellees suggest that Congress actually intended to give the Secretary of Commerce such unbridled discretion as the mere continuation of a historical trend of delegating census taking to the Census Bureau. Much of the Government's and the defendants-appellees' discussion of the problems inherent in counting a large, mobile and heterogeneous population appears offered as a substitute for congressional findings that were never made stating such intent.

Amici agree that declining census participation is a matter of serious concern, as is the persistence of census coverage differentials for different population groups. Both problems reflect broader trends of disengagement from the

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[1]The Census Bureau's plans for the 2000 census differ from a one-in-six sample in degree but not in kind. Previous proposals to estimate the census involved deriving statistical estimates to adjust the results of an attempted complete enumeration. In contrast, the Bureau's plans for the 2000 census are to attempt direct contact of only 90% of each census tract's households following the initial mail-out phase. *See* Commerce Dept. Br. at 8 n.5; J.A. 88-91. The Bureau's estimation plans cannot, therefore, be said to employ "sampling techniques to enhance the accuracy of the count after good-faith efforts to contact all residents directly . . . ." Commerce Dept. Br. at 36 n.19.

process of self-government and, in the case of lower minority participation, a legacy of exclusion from that process.

Statistical estimation as a solution implies reliance on some type of sampling as the basis for deriving adjustments to an initial whole or partial count, obtained through more traditional canvassing methods. A decision actually to estimate the census poses multiple issues of policy and methodology at various levels of generality and specificity.

A general issue raised by statistical estimation is that it substitutes the methods and manipulations of experts for individual participation. As such, estimation acquiesces in broader trends of non-involvement in civic and social life. These trends are themselves an important cause of reduced census participation. *See* J.A. 51. A concrete example of estimation's disincentive to voluntary census participation is that during the mail-back phase of the 1990 census, Wisconsin residents achieved the highest return rate in the nation, an accomplishment that was formally recognized by the Census Bureau. *See Wisconsin v. City of New York*, Nos. 94-1614, 94-1631, 94-1985 (U.S.S.Ct.), Jt. Appendix 95-101. Under the estimates proposed at the time, Wisconsin's reward for these efforts would have been the loss of a seat in Congress and millions of dollars per year in federal funding.

Some estimation methodologies pose significant questions of constitutionality, over and above the general issue of whether an estimated census is ever permitted. For example, the Census Bureau's 1990 estimates of the states' populations were based on multi-state samples. *See Wisconsin v. City of New York*, 517 U.S. 1, 22 (1996). A significant question existed as to whether this procedure comported with the Fourteenth Amendment's textual requirement that Congress be apportioned based the states' populations, "counting the whole number of persons *in each state* . . . ." U.S. Const. amend. XIV, § 2. As noted *supra* footnote 1, previous proposals to use sampling to adjust the census would have done so only after an attempted full count. In contrast, the Executive Branch's plans

for the 2000 census are deliberately to stop counting when 90% of the population is believed to have responded and to estimate the remainder. Whether or not sampling to correct an attempted full enumeration would be constitutionally permissible, granting permission to a procedure which combines statistical estimation with deliberate undercounting would reduce the constitutional text to a mere requirement that some type of population estimate be derived every ten years.

Whatever the theoretical support for statistical estimation as a solution to census coverage problems, statistical projects of this scale, executed under relatively tight time constraints, are subject to unanticipated problems and errors. During the 1990 census, errors in the Census Bureau's June 1991 estimates, which were not discovered until well after Secretary Mosbacher's decision not to adjust the enumeration totals, were found to account for roughly one-fourth of the estimated 2.1% national undercount. *See* Decision of the Director of the Bureau of the Census on Whether to Use Information From the 1990 Post-Enumeration Survey (PES) To Adjust the Base for the Intercensal Population Estimates Produced by the Bureau of the Census, 58 Fed. Reg. 69 (1993); *see also* J.A. 437 (reporting national undercount estimate of 2.08% in June 1991 and 1.58% in July 1992). Had the adjusted totals been substituted for the official count, these undiscovered errors would have caused an erroneous shift of a seat in the House of Representatives from Pennsylvania to Arizona.

As part of the statistical analysis of the 1990 census estimates, reasonable modifications in the estimation procedure produced five different congressional apportionments, affecting the representation of eleven different states. Decision of The Secretary of Commerce on Whether a Statistical Adjustment of the 1990 Census of Population and Housing Should be Made for Coverage Deficiencies Resulting in an Overcount or Undercount of the Population, 56 Fed. Reg. 33582, 33601 (1991). The Census Bureau itself reported three sets of state population estimates in April 1991, each of which would have resulted in a different apportionment. The Census Bureau's

claims that estimation no longer poses a risk of political manipulation relies heavily on the professionalism of the Census Bureau and the specific design of the 2000 census. *See* J.A. at 128-32.[2] But even if the sensitivity of congressional apportionment to estimation methodologies and the ability to know these impacts in advance does not render estimation vulnerable to political manipulation, *cf. City of New York*, 517 U.S. at 11-12, a method that produces multiple apportionments depending on its modeling assumptions provides weak assurance that the apportionment selected will be the correct one. And if the Census Bureau's professionalism provides sufficient safeguard against manipulation, it remains implausible that Congress would accept that risk without so much as considering the imposition of pre-specification standards.

At the same time, *amici* question whether the benefits of estimation are as great as claimed, particularly with respect to the census's textual constitutional function of providing the population totals for apportioning Representatives among the states. The "devastating" effects of not estimating the census identified in the Los Angeles defendants' brief are non-constitutional or at least non-textually constitutional. These are the loss of federal aid under distribution formulas that rely on census data and distortions in intrastate districting. *See* Los Angeles Br. at 6-8. The Census Bureau's description of the effects of inaccuracy in the 1990 census consists of the non-specific statement that "[a]s a result of the inaccuracy in the 1990 Census, many Americans were denied an equal voice in their government. Federal spending employing population-

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[2]Nevertheless, Wisconsin finds it difficult to regard the Bureau's choice of Milwaukee's Complete Count Campaign to assess the benefits and limitations of census outreach programs as mere happenstance. Nor do we understand the Bureau's stating that by 1990 the mail-back return rate had fallen to sixty-five percent, when describing declining census participation, J.A. 52, while simultaneously reporting a seventy-four percent national rate when contrasting Milwaukee's voluntary return rate of seventy-six percent. J.A. 113.

based formulas–for schools, crime prevention, health care, and transportation–was misdirected." J.A. 49.

Efforts to estimate the 1990 count revealed the indirect and complex relation between the differential undercount and the apportionment of the House of Representatives. The term, "differential undercount," tends to mask the diverse texture of census coverage patterns, both within and between states. Every state has renters and home owners, children and adults, rural and urban dwellers, minority and non-minority residents. Some states will have relatively more of one group than another. For example, in 1990, states in the Midwest and Northeast tended to have more African-American residents (as a percentage of total population) than states in the West, but fewer Native Americans and residents of Hispanic origin. *See* U.S. Department of Commerce Bureau of the Census, *1990 Census of Population: Summary Population and Housing Characteristics*, United States Summary (1992), Table 2. Representatives in Congress are apportioned to states, not to demographic groups. In general, but only in general, a state with more non-white and Hispanic residents (as a percentage of the total population) is likely to see an increase in its relative share of the national population as a result of statistical estimation than a state with fewer non-white and Hispanic residents. But the extreme generality of this result cannot be overstated. In 1990, every state in the Northeast and Midwest–states as diverse demographically as New York and New Hampshire, New Jersey and Iowa–was reported as having an undercount below the national average, meaning that a statistical adjustment would have resulted in every one of these states losing population as a percentage of the national total. And while New Mexico asserts that it "suffered the largest percentage undercount of any State" in 1990, *see* Los Angeles Br. at 5, it does not claim, and it was not the case, that "correcting" for the state's estimated undercount made any difference to its congressional apportionment.

When a claim that the Constitution required statistical estimation of the census was before this Court three years ago, the Government recognized that distributional accuracy was the type of accuracy that mattered principally to the census's constitutional purpose. *See City of New York*, 517 U.S. at 20. The Census Bureau's assurances that an estimated 2000 census will be more accurate numerically than conventional enumeration, *see* J.A. at 121-23, are therefore less than convincing to states concerned with the correctness of the apportionment.

The Framers of the Constitution believed Congress should be entrusted with deciding the best way of determining the populations of the states, used to allocate their political representation in the national government. If the census is to be estimated, it can only be after Congress has addressed these and similar issues, had established protections to ensure that the estimates will be both fair and accurate and has expressed plain approval for the practice. As with the decision to establish a self-executing apportionment, it is only through congressional authorization that statistical estimation may come to resolve "the potentially divisive and complex issues associated with" the taking of the decennial census. *Cf. U.S. Dept. of Commerce v. Montana*, 503 U.S. 442, 465 (1992). The parallels between the controversy surrounding apportionment methods and the controversy surrounding census methods are not coincidence. Where the similarity ends is that in this case, the Executive Branch seeks to bypass Congress's consideration of the studies it has commissioned and its reliance on the "decades of experience, experimentation, and debate," *id.*, that have come to surround the issue of census estimation. *Amici* submit that issues as important as these, bearing on the states' representation in the national government and on voluntary participation in this single duty of national residence, are not resolved through implausible manipulations of the Census Act and its legislative history.

CONCLUSION

The judgment of the district court should be affirmed.

Respectfully submitted.

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